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July 12, 2002

VIA HAND DELIVERY

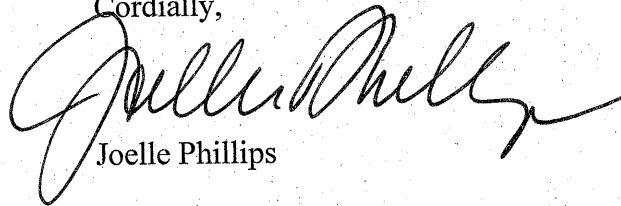
The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to
Declare Switching an Unrestricted Unbundled Network Element*
Docket No. 02-00207

Dear Chairman Kyle:

Enclosed herein for filing, please find the original and fourteen copies of BellSouth's Motion to Hold Proceeding in Abeyance. Copies of the enclosed have been provided to counsel of record.

Cordially,



Joelle Phillips

JP/jej

Enclosure

P 7/16/02

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element*

Docket No. 02-00207

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO HOLD PROCEEDING IN ABEYANCE

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves the Tennessee Regulatory Authority ("TRA") to hold this proceeding in abeyance.¹ The TRA should do so for two reasons.

First, it will be impossible for the TRA to develop a full and complete evidentiary record that will be necessary to resolve the issues in this case under the present schedule. This is because many of the Competing Local Exchange Carriers ("CLECs") currently competing in the local exchange market in Tennessee are not parties in this docket, and the TRA Staff has not yet issued data requests to any non-party CLECs in accordance with the Initial Order Resolving Discovery Disputes that was entered in this docket on June 28, 2002.

Second, even assuming that the TRA were able to develop a full and complete evidentiary record under the present schedule, which is not the case, this proceeding should be held in abeyance in light of the recent decision of the United States Court of Appeals for the D.C. Circuit, which invalidated the standard adopted by the Federal Communications Commission ("FCC") for determining which network elements must be unbundled. *See United States*

¹ Footnote 1 of the "Initial Order Resolving Discovery Disputes" that was entered in this docket on June 28, 2002 states that "[i]f BellSouth wishes to pursue this assertion [that this proceeding should be held in abeyance] it should do so by filing a motion requesting such relief and properly supporting its request." BellSouth is doing so by way of this filing.

Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002). Until the FCC has adopted rules that comply with the D.C. Circuit's decision (or unless and until that decision is modified on appeal), it makes little sense for the TRA to expend its limited resources trying to resolve the issues in this case based upon an unbundling standard that has been invalidated or a new standard that has yet to be adopted.

I. THE TRA SHOULD HOLD THIS PROCEEDING IN ABEYANCE BECAUSE THE TRA WILL BE UNABLE TO DEVELOP A FULL AND COMPLETE FACTUAL RECORD UNDER THE CURRENT SCHEDULE.

The Petitioners' complaint is an attempt to avoid the FCC-created exception to its requirement that an incumbent local exchange telephone company ("ILEC") provide CLECs with unbundled local switching. That exception excuses ILECs like BellSouth from offering unbundled local switching as a UNE at total element long run incremental costs ("TELRIC") in "density zone 1" central offices located in any of the fifty top "MSAs" in the country to any telecommunications carrier serving end users with four or more lines, provided that the ILEC is willing to provide a combination of loops and transport (enhanced extended links or "EELs") to the CLECs in those offices. 47 C.F.R. § 51.319(c)(2). Petitioners would be entitled to the relief they seek in this docket only if "the failure to provide access to [local switching on an unrestricted basis] would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *See* 47 U.S.C. §251(d)(2)(B).

In determining whether CLECs are impaired without access to a given network element, the FCC has, in the past, required the examination of five factors: cost, effect on timeliness of entry, quality, ubiquity, and impact on network operations. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 419 (D.C. Cir. 2002). The FCC also has allowed the consideration of five additional factors, namely whether unbundling would: lead to rapid introduction of competition

in all markets; promote facilities-based competition, investment, and innovation; reduce regulatory obligations; promote certainty in the market; and be administratively practical. *Id.* If these factors continue to remain in effect, the issue in this docket will be whether the Petitioners can prove "impairment" based on these factors.²

On May 24, 2002, BellSouth served discovery requests on several CLECs that are not parties to this proceeding. A representative sample of these discovery requests is attached as Exhibit "A" to this Motion. Each of these discovery requests were designed to elicit facts relevant to one or more of the "impairment" factors discussed above. Each non-party CLEC that was served with these discovery requests objected to responding to them, and BellSouth moved to compel responses.

On June 28, 2002, the Hearing Officer issued his Initial Order Resolving Discovery Disputes ("Order"). This Order provides, in pertinent part, that:

Although the discovery requests submitted by BellSouth [to non-party CLECs] were issued in good faith, the Hearing Officer concludes that BellSouth's motion to compel should be denied. *Instead, the Authority should promulgate data requests to issue to Network Telephone Corp., Business Telecom, Inc., XO Tennessee, Inc., ABS Nashville, and any other CLEC which the Authority determines should respond.*

See Order at 15-16. Clearly, the Order recognizes that the information BellSouth sought from non-party CLECs is relevant to the issues presented in this docket and that the TRA should take appropriate steps to ensure that the record in this proceeding includes this important and relevant information.

² As explained in Section II of this Motion, the United States Court of Appeals for the D.C. Circuit recently reversed the FCC'S Order that established these factors and remanded that Order to the FCC for further proceedings in compliance with the Court's decision. Accordingly, the TRA should hold this proceeding in abeyance until the legal uncertainty regarding the standard the TRA must apply in deciding the issues in this docket is resolved.

BellSouth is unaware of any such data requests having been issued yet to any non-party CLEC as required by the Order. This is understandable in light of recent events associated with the state of Tennessee's budget situation as well as the appointment of new Directors to the TRA. The fact remains, however, that BellSouth needs the information that is responsive to these data requests in order to prepare its direct and/or rebuttal testimony in this docket. This information clearly will not be available by the July 19, 2002 deadline for filing direct testimony, and in all likelihood, it will not even be available by the August 2, 2002 deadline for filing rebuttal testimony.³

At a minimum, therefore, the TRA should hold this proceeding in abeyance while the TRA issues the data requests required by the Order to non-party CLECs, ensures that these non-party CLECs fully respond to these data requests, and allows BellSouth a reasonable amount of time to review the responses to these data requests. Additionally, as explained below, the TRA should continue to hold this proceeding in abeyance until the legal uncertainty surrounding the standard the TRA must apply in resolving the issues in this docket is resolved.

II. THE TRA SHOULD HOLD THIS PROCEEDING IN ABEYANCE BECAUSE OF THE LEGAL UNCERTAINTY SURROUNDING THE STANDARD THE TRA MUST APPLY IN RESOLVING THE ISSUES IN THIS DOCKET.

In addition to having an incomplete evidentiary record, the TRA should suspend this proceeding because of the recent decision by the D.C. Circuit that set aside the FCC's standard

³ The schedule for the submission of testimony was originally established by the Hearing Officer's Order dated May 13, 2002. During the week of July 1, the TRA did not accept filings due to a partial government shutdown and the operation of only essential services arising from Tennessee state revenue and appropriations issues. In light of that closure, BellSouth and the Petitioners in this docket filed a joint motion altering the due dates in this docket in recognition that no filings could be made during that time.

for determining which network elements must be unbundled. See *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

In *United States Telecom Association*, the D.C. Circuit held that, because unbundling comes at a substantial cost, Congress made "impairment" the touchstone for defining the circumstances when network elements must be unbundled. Under Section 251(d)(2) of the federal Telecommunications Act of 1996 ("the 1996 Act"), the unbundling analysis must consider whether "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). According to the Court of Appeals, network elements should not be unbundled when there is no reasonable basis to believe that competition is suffering from the type of impairment about which Congress was concerned. *United States Telecom. Ass'n*, 290 F.3d at 421.

In remanding the FCC's unbundling rules for further consideration, the D.C. Circuit provided guidance about the kind of impairment analysis that the FCC must conduct in deciding whether to unbundle network elements. According to the Court of Appeals, the FCC cannot adopt unbundling rules "detached from any specific markets or market categories." *Id.* at 426. Instead, unbundling requests must be rejected in any specific product or geographic markets where alternatives exist – *i.e.*, where there is no real impairment. Consequently, the level of existing competition and availability of alternative facilities within specific markets must be the cornerstone of the FCC's impairment analysis. *Id.* at 425-426.

The Court of Appeals also indicated that while cost is a consideration in determining whether a CLEC is impaired, cost disparities of just any nature are *not* evidence of impairment. As the Court of Appeals noted, "[t]o rely on cost disparities that are universal as between new

entrants and incumbents in *any* industry is to invoke a concept too broad...to be reasonably linked to the purpose of the Act's unbundling provisions." Instead, according to the D.C. Circuit, the FCC's impairment analysis must focus on "cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful." *Id.* at 427.⁴

Until the FCC adopts an impairment analysis that is consistent with the D.C. Circuit's decision, it would be a waste of limited administrative resources for the TRA to hold hearings on the question of whether CLECs are "impaired" without expanding BellSouth's unbundling obligations. As all the parties to this case agree, the answer to this question turns on the FCC's impairment analysis, which currently is in a state of legal limbo. Regardless of the outcome of this case, the TRA's decision would be subject to legal challenge if the TRA fails to apply the correct impairment analysis, which the FCC has yet to adopt.

The CLECs undoubtedly will argue that the TRA possesses *some* authority to impose unbundling obligations on BellSouth under state law. However, the exercise of any such authority must be consistent with the 1996 Act and FCC regulations implementing the 1996 Act. Federal law specifically requires that state commission orders meet requirements imposed by the FCC:

In . . . imposing conditions upon the parties to the [interconnection] agreement, a State commission shall (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title.*

47 U.S.C. § 252(c) (emphasis added); *see also* 47 U.S.C. § 251(d)(3) (state commission regulations and orders must be consistent with other requirements of § 251); 47 U.S.C. § 251(d)

⁴ BellSouth recognizes that the FCC has sought rehearing and thus the D.C. Circuit's mandate has not issued. However, the procedural posture of the case only adds to the regulatory uncertainty caused by the D.C. Circuit's decision and warrants delaying this proceeding until such uncertainty has been removed.

(requiring the FCC to establish regulations setting forth what network elements must be unbundled, and providing the "necessary" standard for proprietary elements, and "impair" standard for nonproprietary elements).

In addition to the limitations found in Sections 251 and 252, section 261(c) of the 1996 Act permits state commissions to impose additional requirements on telecommunications carriers only when the state requirements are necessary to further competition *and* not inconsistent with the 1996 Act or applicable FCC rules. 47 U.S.C. § 261(c). A state-imposed requirement that BellSouth unbundle network elements in contravention of the 1996 Act and explicit determinations by the FCC would not be consistent with either statutory provision.

Federal court decisions confirm that state commission unbundling decisions must be consistent with, and not contrary to, the 1996 Act and FCC determinations. In the words of the United States Supreme Court, it would be "surpassing strange" to permit 50 state agencies independently to implement a "federal regime" outside of the guidelines established by federal agency regulations. *See AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 730 n.6 (1999). In fact, when the FCC or the courts specifically have determined that a network element does not meet the unbundling requirements of the federal Telecommunications Act of 1996 or federal rules, such determinations are binding on state commissions. The Supreme Court could not have been more clear on this point:

[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competitors away from the states. With regard to the matters addressed by the 1996 act, it unquestionably has.

...

This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the courts that draw the lines to which they must hew.

Iowa Utilities Board, 119 S. Ct. at 730 n.6 (emphasis added).⁵ More recently, the Fifth Circuit echoed the Supreme Court's ruling:

Congress, by enacting the 1996 Act pursuant to its commerce power, validly preempted the states' power to regulate local telecommunications competition. Accordingly, *Congress established a federal system headed by the FCC to regulate local telecommunications competition. The Act permissibly offers state regulatory agencies a limited mission, which they may accept or decline:* to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress.

AT&T Communications v. BellSouth Telecommunications, 238 F.3d 636, 646 (5th Cir. 2001) (citations omitted) (emphasis added); *see also Verizon North, Inc. v. Strand*, 140 F.Supp.2d 803, 811 (W.D. Mich. 2000) (finding that state commission regulations implementing the 1996 Act must not be inconsistent with the 1996 Act or FCC regulations).

The legislative and judicial mandate is clear-cut: the TRA is *not* free to unbundle network elements either when the FCC has said unbundling is not required or, in the absence of such a statement, without applying the impairment requirements of the 1996 Act (as interpreted by the FCC and the federal courts). Since the parameters of those impairment requirements have yet to be drawn consistent with the requirements of the 1996 Act, the TRA should not proceed further with this docket at this time.

CLECs will not be harmed in the interim, as the status quo will be maintained through BellSouth's interconnection agreements -- all of which contain explicit contractual terms that

⁵ *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (holding that state regulation is preempted "to the extent of any conflict with a federal statute"); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (holding that state regulation is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as manifested in the statutory text and implementing regulations). As the Supreme Court has stressed, where Congress or congressionally-designated federal agencies have made a specific "policy-judgment" as to how "the law's congressionally mandated objective" would "best be promoted," the states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier*, 529 U.S. 872, 881.

must be satisfied in order to invoke any "change of law" rights. Moreover, maintaining the status quo also will ensure that the TRA does not have to take additional evidence or render a decision that could well be moot or unlawful if the TRA applies an impairment analysis that is materially different than the new impairment rules the FCC will be required to adopt on remand. For these reasons, BellSouth respectfully requests that the Procedural and Scheduling Order in this docket be suspended until the FCC provides a framework on which the parties can proceed.

III. CONCLUSION

For the reasons set forth above, the TRA should hold this proceeding in abeyance until:

(1) BellSouth has had a reasonable amount of time to review responses to the data requests that will be served on non-party CLECs in compliance with the Initial Order Resolving Discovery Disputes; and (2) the legal uncertainty regarding the standard the TRA must apply in deciding the issues in this docket is resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

- ☐ Hand
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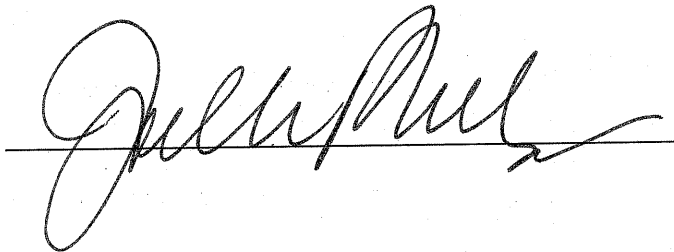


EXHIBIT "A"



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OFFICE
EXECUTIVE SECRETARY

May 24, 2002

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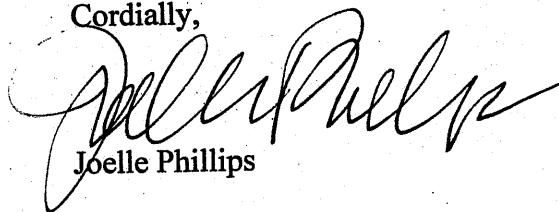
Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to
Declare Switching an Unrestricted Unbundled Network Element
Docket No. 02-00207*

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's First Set of Discovery Requests to XO Communications, Inc. A copy of the enclosed is being provided to counsel of record.

Cordially,



Joelle Phillips

JP/jej

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element*

Docket No. 02-00207

BELLSOUTH TELECOMMUNICATIONS, INC.'S
FIRST SET OF DISCOVERY REQUESTS TO
XO COMMUNICATIONS, INC.

Pursuant to the First Report and Recommendation dated May 13, 2002, BellSouth Telecommunications, Inc. ("BellSouth") is issuing these discovery requests to third parties.

INSTRUCTIONS

- (a) If any response required by way of answer to these requests is considered to contain confidential or protected information, please furnish this information subject to the protective agreement executed by the parties in this docket.
- (b) If any response required by way of answer to these requests is withheld under a claim of privilege, please identify the privilege asserted and describe the basis for such assertion.
- (c) These requests are to be answered with reference to all information in your possession, custody or control or reasonably available to you.
- (d) If any request cannot be responded to in full, answer to the extent possible and specify the reason for your inability to respond fully. If you object to any part of a request, answer all parts of the request to which you do not object, and as to each part to which you do object, separately set forth the specific basis for the objection.
- (e) These requests require supplemental responses consistent with the provisions of the Tennessee Rules of Civil Procedure.

DEFINITIONS

(a) "You" and "your" means XO Communications, Inc., and any affiliated company providing telecommunications service in the State of Tennessee.

(b) "And" and "or" shall be construed both conjunctively and disjunctively, and each shall include the other whenever such construction will serve to bring within the scope of these Interrogatories information that would not otherwise be brought within their scope.

(c) "Identification" or "identify" when used in reference to: (i) a natural individual, requires you to state his or her full name and residential and business address; (ii) a corporation, requires you to state its full corporate name and any names under which it does business, the state of incorporation, and the address of its principal place of business; (iii) a document, requires you to state the number of pages and the nature of the document (e.g., a letter or memorandum), its title, its date, the name or names of its authors and recipients, and its present location or custodian; (iv) a communication, requires you, if any part of the communication was written, to identify the document or documents which refer to or evidence the communication, and to the extent that the communication was not written, to identify the persons participating in the communication and to state the date, manner, place, and substance of the communication.

(d) "Unbundled Local Switching Exemption" means the rule adopted by the Federal Communications Commission, codified at 47 C.F.R. § 51.319(c)(2), which relieves incumbent local exchange carriers from unbundling local circuit switching in certain geographic locations when a requesting carrier serves an end-user with four or more voice grade (DSO) equivalents or lines.

(e) "Switch" means a device composed of hardware and/or software that establishes, manages and releases physical or virtual connections between two or more points in a voice or data transmission system, regardless of the technology employed (e.g., circuit, wireless, packet,

or IP telephony). A "switch" may also perform other functions that enhance the aforementioned connections by providing additional information to or about the parties or devices that are involved in the connections.

DISCOVERY REQUESTS

1. Please identify each switch that you own or operate to provide telecommunications service in the State of Tennessee. In answering this request, please describe with particularity for each such switch:

- (a) the specific location of the switch;
- (b) the type of switch that has been deployed (e.g., circuit, wireless, packet, etc.);
- (c) the functions and capabilities of the switch;
- (d) the geographic area served by the switch;
- (e) the total number of access lines or equivalent lines the switch is capable of serving; and
- (f) the total number of access lines or equivalent lines the switch is currently serving.

2. For each switch identified in the foregoing discovery request, please provide a detailed breakdown of the costs incurred in deploying that switch as well as a complete description of those costs.

3. Please state the total number of switching points of interface you have deployed in the State of Tennessee for the collection of traffic and identify the location of each such switching point of interface.

4. Please identify all carriers that have purchased switching from you in Tennessee.

5. Please identify all carriers that have made inquiries to you regarding purchasing switching from you in Tennessee.

6. Please identify carriers other than BellSouth, of which you are aware, that offer switching in Tennessee.

7. Is it your contention that your ability to provide local exchange service to customers in Tennessee via your own switch has been impeded by a lack of collocation space in BellSouth central offices? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.

8. Please produce any and all documents referred to or identified in response to BellSouth's Discovery Requests.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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